CITY DEVELOPMENTS LTD.

v.

GOH YOKE HIAN & ORS.

HIGH COURT, SINGAPORE
CHAN SEK KEONG J
[ORIGINATING SUMMONS NO. 1090 OF 1987]
23 FEBRUARY 1990

LAND LAW: *Registration - Caveat - Charging order - Nemo dat principle - Sale of property - Priority of claim.*

CIVIL PROCEDURE: *Effect of charging order - Execution proceeding - Effect of bankruptcy.*

The property (119 Sunset Way #06-01, Singapore) had been purchased by the 1st. defendant under an agreement for sale and purchase dated 13 March 1981 from the plaintiff (the developers) at the price of $410,252.50. To finance the purchase, the 1st defendant borrowed the sum of $370,000 from the 2nd defendants and executed a deed of assignment dated 27 March whereby he assigned all his right, title and interest in the property to the 2nd defendants to secure the repayment of the loan. On 3 April 1981, the 2nd defendants, as equitable mortgagee by virtue of the assignment, lodged a caveat against the property under the Land Titles Act ("the ITA") prohibiting the registration of any instrument affecting the property. This caveat lapsed on the expiry of 2 April 1986 and the 2nd defendants lodged a fresh caveat on 3 September 1986.

However, during the subsistence of the 2nd defendant's first caveat, the 3rd defendants, claiming as chargee by virtue of a charging order made on 30 August 1985 ("the charging order") in suit no. 1134 of 1985, had, on 9 October 1985, lodged a similar form of caveat against the property. The 4th defendants followed likewise on 20 November 1985, claiming as a joint chargee (with the 3rd defendants under the charging order).

On 17 October 1986, the 1st defendant was adjudicated a bankrupt in bankruptcy no. 1395 of 1985 upon the petition of the 3rd defendants. The Act of bankruptcy, which was founded upon the 1st defendant's failure to comply with a bankruptcy notice, was committed on 31 August 1985.

On 14 May 1987, the plaintiffs, (apparently in ignorance of the 1st defendant's bankruptcy), commenced an action in suit no. 1367 of 1987 against the 1st defendant for various reliefs and on 21 August 1987, in default of appearance, obtained an order of Court.

The 1st defendant, inevitably, defaulted in payment, whereupon the plaintiffs instead of selling the property pursuant to the said judgment, commenced this second action against the 1st defendant, and in which the 2nd, 3rd and 4th defendants were later joined as parties for the purposes of determining priorities. The plaintifs' claims for reliefs were granted on 11 April 1988 and the balance of the proceeds of sale (the funds) to be deposited in an interest bearing account until the determination of the respective priorities of the 2nd, 3rd and 4th defendants in the said proceeds.

The priorities of the 2nd, 3rd and 4th defendants' respective claims were determined before the Senior Assistant Registrar. He held that by reason of s. 41(1) of the Land Titles Act, the 2nd defendants had lost their priority in the fund to the 3rd/4th defendants as their caveat ceased to affect the property when it lapsed on 3 April 1986 and their second caveat was lodged after the caveat of the 3rd/4th defendants.

This is an appeal by the 2nd defendants against the decision of the Senior Assistant Registrar in which the 2nd defendants contended that the decision of the Senior Assistant was wrong on the following grounds:

1) that s. 41(1) applies only to interests which compete with each or one other;

2) that the interest of the 2nd defendants did not compete with that of the 3rd/4th defendants under the charging order as the charging order could not vest in the 3rd/4th defendants an interest in the property which the 1st defendant did not have at the time the charging order was made.

3) the decision was contrary to the decision in *United Overseas Finance Ltd. v. Mutu Jeras* [1989] 3 MLJ 20; when it was decided by this Court that on true construction of s. 41(1), the lapsing of a prior caveat did not deprive that caveator of his priority over any subsequent caveator who had lodged a caveat during the validity period of the prior caveat.

Counsel for the 3rd/4th defendants has contended that:

1) the charging order had priority under s. 41(1) as the principle of *nemo dat habet* had no application, and

2) the decision in Mutu Jeras should not be followed as it did not take into account the effect of s. 40 of the Land Titles Act.

Held:

[1] The interest of the 1st defendant charged by the charging order was a limited interest. The interest did not impinge on the interest of the 2nd defendants in the same property. It was limited to whatever interest that the 1st defendant had in the property, which was the right to redeem the interest assigned to the 2nd defendants. The filing of caveat by the 3rd/4th defendants could not increase or extend their interest under the charging order. The interests of the parties were not competing interests and accordingly the question of priority *inter se* did not arise. The 3rd/4th defendants could not have been in a better position than the 1st defendant *vis-a-vis* the 2nd defendants. Section 41(1) of the Land Titles Act 1956 has no application to unregistered interests in land that are not competing interests.

[2] Even if I am wrong in my finding that s. 41(1) has no application because the interests of the parties are not competing, the 3rd/4th defendants' claim to priority must also fail on the ground of the bankruptcy of the 1st defendant before the execution proceeding was completed. On the date of the 1st defendant's bankruptcy, the charging order ceased to have effect and the 3rd/4th defendants lost their security in the property of the 1st defendant. The caveat lodged by the 3rd/4th defendants ceased to protect any interest which could be claimed by them, the same having been destroyed by the bankruptcy of the 1st defendant.

[3] On the contention of the Counsel for the 3rd/4th defendants that the decision in *Mutu Jeras* was wrong as it failed to take into account the effect of s. 40(1) of the Land Titles Act, I do not accept their argument for the following reasons; firstly, the word "notification" means the act of notifying a caveat on the land register. An act of notifying cannot be dead or alive. It refers to a historical act. Once it is done, it is done. The lapsing of a caveat cannot extinguish the act. Secondly, s. 40(1) is not concerned with the loss of priority on the lapsing of a caveat but the gain of priority upon the notification of any instruments creating or evidencing any interest. Moreover, it is doubtful whether a caveat evidences an interest in land; it certainly does not create any interest in land. Thirdly, s. 40(1) deals with common law interests in land subsisting at the date of issue of a qualified certificate

(see s. 20), instruments in respect of registered interests and not unregistered interest created or subsisting after the land has been brought under the Act. Priority of post-conversion unregistered interest is determined by s. 41.

[4] The appeal is allowed with costs here and below. There will be a declaration that the 2nd defendants has a prior claim to the fund.

[Appeal allowed]

Cases referred to:
St. Mary's Parish Credit Union Ltd. v. TM Ball Lumber Co. Ltd. [1961] 27 DLR (2nd) 552
United Overseas Finance Ltd. v. Mutu Jeras [1989] 2 MLJ 20
Bank of China v. The First National Bank of Boston [1988] 3 MLJ 401
Fung Sin Wa v. Moi Chan Hen [1897] SSLR 175
Ng Boo Bee v. Khaw Joo Choe [1921] 14 SSLR 90
Chung Khiaw Bank v. United Overseas Bank [1970] 1 MLJ 185
The Official Assignee of the Property of Lim Chiak Kim, A Bankrupt v. United Overseas Bank [1988] 3 MLJ 189

Legislation referred to:
Bankruptcy Act [Sing], ss. 49, (1)
Civil Procedure Code 1906 [Sing], s. 617(1)
Land Titles Act 1956 [Sing], ss. 20(7), 40, 41, (1), 65(2), 117(1), (2)
Registration of Deeds Act (Cap 269) [Sing], s. 7(3)
Rules of the Supreme Court 1970 [Sing], O. 50 rr. 1, 1(4)

For the 2nd defendants - George Pereira
For the 3rd defendants - Chan Kok Chye
For the 4th defendants - Koh Kok Wah

JUDGMENT

Chan Sek Keong J:

This is an appeal by the 2nd defendants against the decision of the Senior Assistant Registrar that the claims of the 3rd/4th defendants had priority over the claim of the 2nd defendants in respect of the proceeds of sale of a property known as 119 Sunset Way #06-01, Singapore ("the property").

The property had been purchased by the 1st defendant under an agreement for sale and purchase dated 13 March 1981 from the plaintiff (the developers) at the price of $410,252.50. To finance the purchase, the 1st defendant borrowed the sum of $370,000 from the 2nd defendants and executed a deed of assignment dated 27 March 1981 whereby he assigned all his right, title and interest in the property to the 2nd defendants to secure the repayment of the loan. On 3 April 1981, the 2nd defendants, as equitable mortgagee by virtue of the assignment, lodged a caveat against the property under the Land Titles Act ("the LTA") prohibiting the registration of any instrument affecting the property. This caveat lapsed on the expiry of 2 April 1986 and the 2nd defendants lodged a fresh caveat on 3 September 1986.

However, during the subsistence of the 2nd defendant's first caveat, the 3rd defendants, claiming as chargee by virtue of a charging order made on 30 August 1985 ("the charging order") in suit no. 1134 of 1985, had, on 9 October 1985, lodged a similar form of caveat against the property. The 4th defendants followed likewise on 20 November 1985, claiming as a joint chargee (with the 3rd defendants under the charging order).

The operative part of the charging order ordered that:

> 1 The interest of the 2nd defendant in the property at #06-01 Sunset Way Block 119, Singapore 2159 (Lot 4129/U97 Mukim 5, Pandan) comprised in the Subsidiary Strata Certificate of Title Vol. 176 Folio 94 stand charged in favour of the plaintiffs and the Bank of Montreal who will hold the security jointly and in equal shares with the payment of $3,184,070.81 the amount due from the said 2nd defendant to the plaintiffs on a Judgment of the High Court dated 29 April 1985 and interest thereon at 12.25% per annum from 23 January 1985 to date of judgment and $700 costs together with $205 the costs of this application, the said costs to be added to the judgment debt, and with the payment of $2,173,548.86 the amount due from the said 2nd defendant to the Bank of Montreal on a judgment of the High Court dated 5 August 1985 in suit no. 2089 of 1985 with interest thereafter at 8% per annum to payment and costs of $700.

On 17 October 1986, the 1st defendant was adjudicated a bankrupt in bankruptcy no. 1395 of 1985 upon the petition of the 3rd defendants. The Act of bankruptcy, which was founded upon the 1st defendant's failure to comply with a bankruptcy notice, was committed on 31 August 1985.

On 14 May 1987, the plaintiffs, (apparently in ignorance of the 1st defendant's bankruptcy), commenced an action in suit no. 1367 of 1987 against the 1st defendant for various reliefs and on 21 August 1987, in default of appearance, obtained an order of Court for: (i) an order for specific performance of the agreement for sale and purchase dated 13 March 1981; (ii) a declaration that the plaintiffs had a lien on the property in respect of property for $100,528.72 and interest thereon, being the balance of the unpaid purchase price and (iii) an order that the plaintiffs be at liberty to enforce the lien by selling the property upon the 1st defendant defaulting in the payment of the unpaid purchase price.

The 1st defendant, inevitably, defaulted in payment, whereupon the plaintiffs instead of selling the property pursuant to the said judgment, commenced this second (and quite unnecessary) action against the 1st defendant, and in which the 2nd, 3rd and 4th defendants were later joined as parties for the purpose of determining priorities. In this action the plaintiffs claimed (i) an order for sale of the property free from encumbrances by public auction or private treaty, with liberty to plaintiffs to bid at the sale, (ii) an order that the caveats lodged by the 1st, 2nd, 3rd and 4th defendants be withdrawn, and (iii) the proceeds of sale be applied in the following order of priorities: property tax, maintenance charges, cost of the sale and (iv) plaintiffs' claim, and that the costs of the plaintiffs be paid by the 1st defendant.

On 11 April 1988, the plaintiffs obtained (the official assignee on behalf of the 1st defendant not objecting) an order for the reliefs (i) to (iv) mentioned above, the payment of two other small sums, and for the balance of the proceeds of sale ("the fund") to be deposited in an interest bearing account until the determination of the respective priorities of the 2nd, 3rd and 4th defendants in the said proceeds. This sale was effected and the fund paid into a deposit account.

The priorities, *inter se*, of the 2nd, 3rd and 4th defendants' respective claims were determined before the Senior Assistant Registrar. He held that by reason of s. 41(1) of the Land Titles Act, the 2nd defendants had lost their priority in the fund to the 3rd/4th defendants as their first caveat ceased to affect the property when it lapsed on 3 April 1986 and their second caveat was lodged after the caveats of the 3rd/4th defendants. Section 41(1) of the Land Titles Act provides as follows:

> Except in the case of fraud, the entry of a caveat protecting an unregistered interest in land under the provisions of this Act gives that interest priority over any other unregistered interest not so protected at the time when the caveat was entered.

In this appeal, Counsel for the 2nd defendants has contended that the decision of the Senior Assistant Registrar was wrong on the following grounds:

(1) that s. 41(1) applies only to interests which compete with each or one other;

(2) that the interest of the 2nd defendants did not compete with that of the 3rd/4th defendants under the charging order as the charging order could not vest in the 2nd/3rd defendants an interest in the property which the 1st defendant did not have at the time the charging order was made, reference was made to the decision of the Supreme Court of Canada in *St Mary's Parish Credit Union Ltd. v. TM Ball Lumber Co. Ltd.* [1961] 27 DLR (2nd) 552;

(3) the decision was contrary to my decision in *United Overseas Finance Ltd. v. Mutu Jeras* [1989] 3 MLJ 20; when it was decided by this Court that on a true construction of s. 41(1), the lapsing of a prior caveat did not deprive that caveator of his priority over any subsequent caveator who had lodged a caveat during the validity period of the prior caveat.

Counsel for the 3rd/4th defendants has contended otherwise, that (i) the charging order had priority under s. 41(1) as the principle of *nemo dat non habet* had no application, and (ii) the decision in Mutus Jeras should not be followed as it did not take into account the effect of s. 40 of the Land Titles Act.

In support of the first ground, Counsel for the 3rd/4th defendants relied on the decision of Lai J in *Bank of China v. The First National Bank of Boston* [1988] 3 MLJ 401. In that case the execution creditors had obtained a charging order and lodged a caveat against the debtor's property at a time when the equitable mortgagees' caveat had already lapsed, and was no longer under that section. Lai J accepted the argument of Counsel for the execution creditors on the basis of the authorities cited to him, *viz.*, *Fung Sin Wa v. Moi Chan Hen* [1897] SSLR 175, *Ng Boo Bee v. Khaw Joo Choe* [1921] 14 SSLR 90, *Chung Khiaw Bank v. United Overseas Bank* [1970] 1 MLJ 185, and *Re Tan Kiong Hwa* [1972] 239). His Lordship held that priority was determined by the date of lodgment of the caveat as provided by s. 41.

I shall consider first the argument based on the *nemo dat* principle. This principle applies to voluntary dispositions of property where the transferor purports to transfer to someone property which does not belong to him and in respect of which he has not been given any power to effect the transfer or where having transferred his property to someone purports to transfer the same property to a second person, thus giving rise to conflicting claims between the two transferees. The *nemo dat* principle has no application to cases where the property or interest is involuntarily acquired, as in execution proceedings. In such a case, the issue is not what the judgment debtor has purported to transfer or give to the judgment creditor but what the latter has purported to seize or attach or charge by way of execution. Thus, the relevant issue in the present case is the extent of the interest in the property that was acquired by the 3rd/4th defendants under the charging order. To determine this issue, two questions have to be asked: (i) what was the interest that the 3rd/4th defendants sought to charge when they applied for a charging order and (ii) what interest was given to them by the charging order. When the nature of the interest so acquired by the 3rd/4th defendants has been so determined, then one can proceed to the next issue whether such interest conflicts with that of the 2nd defendant so as to require a determination of priorities between the claims.

An illustration of this approach is found in the case of *Ng Boo Bee*. In that case, the judgment debtor had conveyed his property to and had received the full purchase moneys from the purchaser who had gone into possession. The judgment creditor obtained a writ of seizure and sale against the property and registered it under the Registration of Deeds Act before the purchaser registered his conveyance. The purchaser applied to set aside the execution and the creditor claimed priority, relying on the decision in *Fung Sin Wa's* case. The Court of Appeal, by a majority, declined to treat the dispute as a contest of competing claims on the ground that the creditor could only seize what the debtor had. This followed from the Court's construction of s. 617(1) of the Civil Procedure Code 1906 which provided that the property that was liable to be seized was that belonging to the judgment debtor. The Court held that the writ of seizure seized nothing because the debtor had nothing left in the property to be seized. Bucknill CJ said (at p. 103):

> The immediate inquiry is being directed, not as to whether the one or the other of these two assurances shall have priority, but as to whether the earlier in date is intrinsically of any force or effect: in other words whether the property seized belonged at the date of seizure to the judgment debtor or not.
>
> No question of priority as between the two assurances could in my opinion therefore arise until it had been decided the property seized did at the date of seizure belong to the judgment debtor and the writ of seizure was intrinsically good.

In relation to the first issue, reference may be made to the affidavit of Lai Mun Kwan filed on 24 July 1985 in suit no. 1134 of 1985 wherein was exhibited a copy of the relative subsidiary certificate of title endorsed with the caveat lodged by the 1st defendant and the caveat of the 2nd defendants. The application was for an order that the property or the interest of the 1st defendant be charged with the payment of the judgment debt. The charging order that was obtained was in similar terms. What was the interest of the 1st defendant? It was only the equity of redemption in respect of the property described in the charging order as the 1st defendant's right title and interest in the property had been assigned to the 2nd defendants. Order 50 r. 1(4) requires the judgment creditor to state on affidavit the interest in immovable property which he seeks to impose a charge. The form of the charging order nisi prescribed by the 1970 Rules (Form 103) requires the execution creditor to describe the interest that the debtor is **entitled to**. Clearly, the charging order could only have charged what the 1st defendant had at the time it was made, which was the equity of redemption. In any case, the Court had no power to make any charging order except one which charged whatever interest the judgment debtor had in the property. Having had notice of the 2nd defendant's interest in the property, the 3rd/4th defendants could not have intended to charge that part of the interest that was vested in the 2nd defendants and which were then protected by a caveat.

It needs to be stated that when the Court makes a charging order, the Court is not concerned with the priority of the charging order as against other claims to the same property. The Court is only concerned with what the judgment creditor seeks to charge and what it can order by way of execution. If the 3rd/4th defendants had intended to charge or had obtain a charging order purporting to charge **that** interest, the charging order would have been set aside or varied on an application by the 2nd defendants.

In my view, the position of an execution creditor who obtains a charging order against any immovable property of the debtor already subject to an existing mortgage is analogous to that of a lender who knowingly accepts a mortgage on the residual interest of a mortgagor who has already granted a first mortgage on the same property. The interest is the same.

The execution creditor intends to charge whatever the law can give him, which is whatever the debtor has. Similarly, the second mortgagee intends to accept whatever the mortgagor has, which is what remains in the property after the first mortgage. In *St Mary's Parish Credit Union Ltd. v. Tm Ball Lumber Co. Ltd.* [1951] 27 DLR (2nd) 551, there was a contest between two equitable mortgagees for priority. The second mortgagees caveated their interest before the first mortgagees caveated theirs. Although the statute in question, the Land Titles Act, RSS 1953, did not contain a provision corresponding to s. 41(1) of the Land Titles Act, it contained a provision that priority of instruments effecting the same land shall be in accordance with the date of registration and not the date of execution. The Supreme Court of Canada held that the second mortgagees did not have priority as, on the evidence, they, having been informed of the existence of the first mortgage, had agreed with the mortgagor that their second mortgage would only be on the mortgagor's equity of redemption. The Court held that in this situation, the two equitable mortgages did not effect the same interest in the land and were therefore not conflicting. The Court also held that if the second mortgage had been registered, it could only have effect "according to the intent or tenor thereof" by virtue of s. 65(2) of the Land Titles Act.

In my view, the interest of the 1st defendant charged by the charging order was a limited interest. That interest did not impinge on the interest of the 2nd defendants in the same property. It was limited to whatever interest that the 1st defendant had in the property, which was the right to redeem the interest assigned to the 2nd defendants. The filing of caveats by the 3rd/4th defendants could not increase or extend their interest under the charging order. In my view, the interests of the parties were not competing interests and accordingly the question of priority *inter se* did not arise. The 3rd/4th defendants could not have been in a better position than the 1st defendant *vis-a-vis* the 2nd defendants. Section 41(1) has no application to unregistered interests in land that are not competing interests.

In relation to execution proceedings against registered land, it is pertinent to observe that when the Land Titles Act was enacted in 1956 to provide for a new system of land registration, the prescribed mode of execution against registered land was by way of writ of seizure and sale which has to be registered in the land register before it can bind the land. Section 117(1) and (2) provide as follows:

> (1) The interest in registered land which may be sold in execution under a writ is the interest which belongs to the judgment debtor at the date of registration of the writ.
>
> (2) For the purpose of determining the interest in land which belongs to the judgment debtor:
>
> (a) ...
>
> (b) any interest in land created previously to the date of registration of the writ, and not notified in the land register nor protected by a caveat at least 3 clear days before the sale,
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> is void against a purchaser of the land at the sale in execution under the writ.

The effect of para. (b) of s. 117(2) is to make the land register conclusive as to the interest of the judgment debtor that will be passed on the purchaser upon the sale. But the provision clearly recognises the principle under the general law that the execution creditor cannot seize what the debtor does not have. In order to give effect to the principle of the conclusiveness of the land register and to ensure that a *bona fide* purchaser at the sale is not subject to prior unregistered interests, the provision destroys such claim by rendering void if they are not registered or notified within three clear days from the date of the sale. This is still the only means of execution specifically provided for in the Act: see s. 113. The charging order

as an alternative mode of execution against immovable property was introduced in 1970 under the Rules of the Supreme Court 1970 ("the 1970 Rules"). If Counsel for the 3rd/4th defendants is correct in his submission, then O. 50 r. 1 would have the effect of giving greater rights to execution creditors against registered land than was contemplated by the Legislature under the Land Titles Act.

In my view, the decisions referred to in the *Bank of China* case and relied upon by Counsel for the 3rd/4th defendants, *viz.*, *Fung Sin Wa's* case, the *Chung Khiaw Bank case, Re Tan King Hwa or Ng Boo Bee* are relevant to the present case. *Fung Sin Wa's* case was decided on a construction of s. 7(3) of the Registration of Deeds Act, and in the *Chung Khiaw Bank* case, the Privy Council accepted as correct the decision in *Fung Sin Wa's* case that a writ of seizure of sale when registered was an "assurance for valuable consideration" and therefore by reason of s. 7(3) of the Registration of Deeds Act, the execution creditor had priority. *Ng Boo Bee's* case, as we have seen, applied the general law principle to defeat the claim of the execution creditor. This decision was not referred to the Privy Council without disapproval in the *Chung Khiaw Bank* case. *Re Tan Kiong Hwa* is the only case where the *nemo dat* principle was relevant as the owner purported to sell the same property to two purchasers. Their interests were competing interests and the Court held that s. 41(1) applied to determine priority.

It would appear that in the *Bank Of China* case, Lai J considered that the interest of an execution creditor under a charging order did compete with that of a prior equitable mortgagee in respect of the same property, and his Lordship decided that the later interest had priority as the prior caveat protecting the mortgagee's interest had already lapsed and not renewed at the time the creditor lodged his caveat. However, this is not the case here as at the date of the charging order absolute and the lodgment of the caveat to protecting the interest therein, the equitable mortgagee had a **subsisting** caveat protecting his prior interest. For this reason, I hold that the *Bank of China* case is not applicable to the present case.

Even if I am wrong in my finding that s. 41(1) has no application because the interests of the parties are not competing, the 3rd/4th defendants' claim to priority must also fail on the ground of the bankruptcy of the 1st defendant before the execution proceeding was completed.

In the *Official Assignee of the Property of Lim Chiak Kim, A Bankrupt v. United Overseas Bank* [1988] 3 MLJ 189, which was decided one week after the *Bank of China* case, the Court of Appeal held that an execution creditor who had obtained a charging order against the land of the judgment debtor lost its status as a secured creditor under the charging order where the debtor was made a bankrupt before the execution could be completed by sale of the property charged thereunder. The basic facts of the case were simple. Lim was the registered proprietor of the property in question. BOC was the registered mortgagee and UOB was the execution creditor who had obtained the charging order absolute and lodged a caveat to protect the security given thereby. UOP did not complete the execution by sale. It was BOC who, as mortgagee, sold the property, paid itself off first and the balance of the proceeds of sale to the official assignee (Lim having then been adjudicated a bankrupt). The question was whether UOB or the official assignee was entitled to the said balance. Two issues were canvassed before the Court: (a) whether the charging order constituted a charge on the property, and (b) if the answer was yes, whether UOB was entitled to payment under its charging order. The Court of Appeal decided that a charging order created a statutory charge (which was not a legal charge) on registered land, but that because the charging order was also a mode of execution, it was not completed by sale, and accordingly, upon the bankruptcy of the debtor, the execution creditors lost the benefit of the execution by virtue of s. 49 of the Bankruptcy Act.

The Court of Appeal in effect held that a charging order absolute was defeasible upon the bankruptcy of the judgment debtor before the completion of the execution. Upon the happening of that event, UOB lost its status as a secured creditor under the charging order.

In the present case, the 3rd/4th defendants had not completed their execution when the 1st defendant was made a bankrupt on 17 October 1986. On that date, the charging order ceased to have effect and the 3rd/4th defendants lost their security in the property of the 1st defendant. The caveats lodged by the 3rd/4th defendants ceased to protect any interest which could be claimed by them, the same having been destroyed by the bankruptcy of the 1st defendant. I do not think that the 3rd/4th defendants can get over this obstacle in their claim on the ground that the issue of priority between them and the 2nd defendants is a separate issue from that of the right of the official assignee against them under s. 49(1) of the Bankruptcy Act. In my view, the two issues are inextricably linked, as the claim of priority of the 3rd/4th defendants is founded on their having a secured interest in the property in the first place. Section 49(1) of the Bankruptcy Act is not expressed in terms which render the execution voidable. It is expressed in terms which renders it void in conformity with the statutory scheme for equal distribution of the bankrupt's assets in bankruptcy.

I do not find this result surprising, as the official assignee, on succeeding to the benefit of the execution, would find that he would not be able to resist the claim of the 2nd defendants as equitable mortgagees, whether or not they have a subsisting caveat against the property. As between a secured creditor of the bankrupt and the official assignee, the question of priority does nor arise at all.

I turn now to the second argument of Counsel for the 3rd/4th defendants that my decision in Mutu Jeras was wrong as it failed to take into account the effect of s. 40(1) of the Land Titles Act. Section 40(1) reads:

> 40.(1) Except as provided in s. 20(7), interests appearing in the land-register have priority according to the order of their registration or notification, irrespective of the dates of the instruments by which those interests were created or are evidenced.

The argument of Counsel ran as follows: (i) that under s. 40(1), interests appearing in the land-register had priority according to the date of registration or notification of the relative instruments creating or evidencing them, (ii) that unregistered interests protected by caveats are notified and therefore s. 40(1) applied to all caveats, (iii) that the word "notification" meant a "live" or subsisting and not a dead notification. Upon the lapsing of the 2nd defendant's first caveat, the notification in respect of that caveat also lapsed. It became a dead notification and was therefore not a notification for the purpose of the section. Hence, the 3rd/4th defendants' had priority as their caveats were notified at a time when the notification of the 2nd defendants' caveat had lapsed. I do not accept this argument for the following reasons. Firstly, the word "notification" means the Act of notifying a caveat on the land register. An Act of notifying cannot be dead or live. It refers to a historical Act. Once it is done, it is done. The lapsing of a caveat cannot extinguish the Act. Secondly, s. 40(1) is not concerned with the loss of priority on the lapsing of a caveat but the gain of priority upon the notification of any instruments creating or evidencing any interest. Moreover, it is doubtful whether a caveat evidences an interest in land: it certainly does not create any interest in land. Thirdly, s. 40(1), in my view, deals with common law interests in land subsisting at the date of issue of a qualified certificate (see s. 20), instruments in respect of registered interests and not unregistered interest created or subsisting after the land has been brought under the Act. Priority of post-conversion unregistered interest is determined by s. 41.

Counsel has not persuaded me that s. 40 adversely affects my reasoning in Mutu Jeras.

For the above reasons, the appeal is allowed with costs here and below. There will be a declaration that the 2nd defendants has a prior claim to the fund.

Also found at [1990] 1 CLJ 1021